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No. 03-373

In the
Supreme Court of the United States

GARY E. HELLER, PETITIONER

v.

URBANO C. ALEJO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent does not dispute that the decision below specifically addressed and resolved the first question presented in *Muhammad* v. *Close*, cert. granted, No. 02-9065 (June 16, 2003). In that case, this Court granted the petition for a writ of certiorari to decide, *inter alia*, whether a prisoner who challenges "only the conditions, rather than the fact or duration, of his confinement must satisfy the favorable termination requirement of" *Heck* v. *Humphrey*, 512 U.S. 477, 486-487 (1994). In the decision under review in *Muhammad*, the Sixth Circuit answered that question in the affirmative, holding that *Heck* applies whenever a judgment in the prisoner's favor would impugn the results of prison discipline proceedings, whether or not the fact or duration of confinement are at issue. 02-9065 Pet. App. A2. In this case, the Seventh Circuit reached the opposite result, holding that

"where a prisoner-litigant challenges only the conditions of confinement, rather than the fact or duration of his confinement, *Heck*'s favorable-termination requirement does not apply." Pet. App. 12a; see *id.* at 13a.

Respondent argues that, notwithstanding the identity of the legal issues, this Court should not hold the petition pending *Muhammad* because (according to respondent) the *Heck* issue was abandoned in the court of appeals. Br. in Opp. 2. But neither the district court nor the court of appeals found abandonment. Granting summary judgment to petitioner, the district court invoked the favorable-termination requirement of *Heck*, holding that it applies with equal force to conditions-of-confinement cases. Pet. App. 21a, 22a & n.1 (adopting magistrate's recommendation); *id.* at 25a-26a (magistrate's recommendation). Reversing the district court's judgment, the court of appeals addressed the same issue and held that *Heck* applies only to cases involving the fact or duration of confinement. *Id.* at 12a-13a. Given that both decisions below expressly addressed and resolved the issue, it is difficult to see how it can be deemed "abandoned."

Respondent's contrary argument seems to rest on the fact that petitioner, confronted with on-point Seventh Circuit precedent declaring that *Heck* does not apply to conditions-of-confinement cases like this one, "acknowledged" that circuit precedent precluded *Heck*'s application here. Br. in Opp. 2. But petitioner's admission that circuit law foreclosed his argument does not constitute abandonment of the issue. Rather, by specifically identifying the issue for the court of appeals with supporting and contrary authority, Gov't C.A. Br. 16-17 & n.3 (Resp. Br. App. 22a-23a, 25a n.3)—prompting the court of appeals to address the issue with specificity in its decision—petitioner preserved the issue for potential

review in this Court. Respondent's implicit contention that petitioner was also required to present to the court of appeals an argument squarely foreclosed by circuit precedent not only lacks legal basis, but defies both the principle of stare decisis and the duty of candor owed to the courts. In any event, whether petitioner abandoned an argument *in the court of appeals* is at most an issue *for the court of appeals* to resolve following remand (if any) from this Court in light of the decision in *Muhammad*.[1]

This Court, of course, will not ordinarily "decide questions *neither raised nor resolved* below." *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (emphasis added) (citing *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992)). But that rule has no application where, as here, the legal issue was specifically identified to the court of appeals and the court of appeals unmistakably resolved it. For the same reason, respondent's reliance (Br. in Opp. 2) on *Beck* v. *Washington*, 369 U.S. 541 (1962), is misplaced. In that case, this Court declined to address an issue that had *neither* been pressed *nor* passed upon in the state supreme court. In particular, the Court declined to address an equal protection argument that "was never properly presented to" the state courts, *id.* at 550, and that was not "actually decided by the Washington Supreme Court," *id.* at 553. *Beck* nowhere suggests that this Court will decline to review an issue the party identified to the court of appeals and that the court

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[1] Respondent, moreover, is ill-positioned to argue forfeiture. Respondent never contested *Heck*'s applicability before the magistrate or the district court, raising that issue instead for the first time on appeal. See Pet. App. 22a (respondent "does not challenge the portions of the report dealing with the applicability of *Heck*"); Gov't C.A. Br. 17 (Resp. Br. App. 23a).

of appeals resolved, much less that the Court will decline to hold a petition raising such an issue pending decision in another case.[2]

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be held pending decision in *Muhammad* v. *Close*, No. 02-9065, and then disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

THEODORE B. OLSON
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[2] Respondent similarly errs in relying (Br. in Opp. 2) on *City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987) (per curiam). In that case, the issue was neither raised before nor resolved by the court of appeals. See *id.* at 259 (The Court does "not believe that [the court of appeals] pursued the extraordinary course of considering this issue—which petitioner had not even *raised* in its arguments to that court."). In *Kibbe*, moreover, the petitioner sought to challenge jury instructions, where she had not merely failed to object to them, but had specifically requested them. The Court thus explained that "Rule 51 of the Federal Rules of Civil Procedure provides that '[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict,'" and noted that "there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested." 480 U.S. at 259.